Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–32–89
PS GILL J
12 MAY 1993

Civil Procedure—*Jurisdiction — High Court — Whether High Court judge could alter and vary judgment drawn up, affirmed and perfected by Supreme Court*

Civil Procedure—*Res judicata—Issue of liquidated damages not raised at the trial — Whether defendant estopped from making the same claim under present suit*

Civil Procedure —*Functus officio—Whether High Court judge functus officio once judgment on merit of the case pronounced and perfected*

By a sale and purchase agreement dated 20 August 1984, the second defendant agreed to sell to the plaintiff a piece of estate land for RM47,939,958. The plaintiff paid a deposit of RM4,793,995.80 but failed to pay the balance within the stipulated period or the extended completion period. The second defendant then terminated the said agreement and forfeited the said deposit. Upon hearing all the evidence, the learned judge held that the termination was invalid and ordered specific performance of the contract [see [1992] 2 MLJ 68]. On appeal to the Supreme Court, their Lordships dismissed the appeal and affirmed the judge's decision [see [1993] 1 MLJ 113]. Subsequently, the plaintiff paid the sum of RM43,145,962.20 being the balance of the purchase price and obtained valid and legal title to the land. On 17 February 1993, the second defendant filed an application by way of summons-in-chambers seeking an order that for the purpose of the specific performance of the sale and purchase agreement, the plaintiff should pay to the second defendant a further sum as liquidated damages calculated at RM11,000 per day as expressly provided for in cl 3.4 of the agreement from 21 May 1985 to the date of payment.

Held, dismissing the second defendant's application:

(1) In the trial proper, the second defendant did not at any time raise the issue of a claim of RM11,000 liquidated damages per day in its pleading, and did not file a counterclaim in the suit and neither did counsel for the second defendant raised the issue in his submission. No satisfactory explanation was given as to why the issue of liquidated damages relating to cl 3.4 of the agreement was not raised at the trial.

(2) This court is functus officio once judgment on the merits of the case had been pronounced and the order perfected.

[Bahasa Malaysia summary

Melalui suatu perjanjian jualbeli yang bertarikh 20 Ogos 1984, defendan kedua bersetuju menjual kepada plaintif sebidang tanah estet untuk

RM47,939,958. Plaintif telah membayar deposit RM4,793,995.80 tetapi gagal membayar baki dalam tempoh masa yang ditetapkan atau dalam tempoh pelaksanaan yang telah dilanjutkan. Defendan kedua telah menamatkan perjanjian itu dan telah melucuthakkan deposit itu. Selepas mendengar kesemua keterangan, hakim yang arif telah memutuskan bahawa penamatan itu adalah tidak salah dan mengarahkan pelaksanaan spesifik kontrak itu [lihat [1992] 2 MLJ 68]. Apabila rayuan dibuat ke Mahkamah Agong, hakim yang arif telah menolak rayuan itu dan mengesahkan keputusan hakim itu [lihat [1993] 1 MLJ 113]. Plaintif kemudiannya telah membayar sejumlah RM43,145,962.20 iaitu baki harga belian dan telah memperolehi hakmilik tanah itu dengan sah dan menurut undang-undang. Pada 17 Februari 1993, defendan kedua telah memfailkan suatu permohonan melalui saman dalam kamar untuk mendapat suatu perintah bahawa untuk tujuan pelaksanaan spesifik perjanjian jualbeli itu, plaintif sepatutnya membayar defendan kedua ganti rugi jumlah tertentu sebanyak RM11,000 sehari sepertimana yang diperuntukkan dalam fasal 3.4 perjanjian itu dari 21 Mei 1985 ke tarikh pembayaran.

Diputuskan, menolak permohonan defendan kedua:

(1) Di dalam perbicaraan sebenar, defendan kedua tidak pada bila-bila masa membangkitkan isu tuntutan ganti rugi jumlah tertentu sebanyak RM11,000 sehari itu di dalam plidingnya, dan tidak memfailkan suatu tuntutan balas di dalam guaman itu dan peguambela defendan kedua juga tidak membangkitkan isu itu di dalam perhujahan beliau. Penjelasan yang memuaskan tidak diberi untuk menunjukkan mengapa isu berkaitan dengan ganti rugi jumlah tertentu di dalam fasal 3.4 perjanjian itu tidak dibangkitkan di dalam perbicaraan itu.

(2) Mahkamah ini functus officio sebaik sahaja penghakiman atas merit kes ini dilafazkan dan perintah itu disempurnakan.]

Notes

For cases on the jurisdiction of the High Court, see *2 Mallal's Digest* (4th Ed) paras 1436–1438.

For cases on res judicata, see *2 Mallal's Digest* (4th Ed) paras 1937–1965.

For cases on a judge being functus officio, see *2 Mallal's Digest* (4th Ed) paras 1005–1006.

Cases referred to

1 *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581; [1975] 2 WLR 690; 119 SJ 273 (refd)

2 *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536; [1966] 3 WLR 125 (refd)

3 *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 (refd)

4 *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (refd)

A 5 *Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal* [1992] 2 MLJ 734 (refd)

Wong Kim Fatt (*M Pathmarajah* with him) (*Gulam & Wong*) for the plaintiffs.

B *P Royan* (*Robert Lai Poh Fye* and *Ng Thian Woon* with him) (*Jackson & Masacorale*) for the second defendant.

PS Gill J: This application is concerned with the jurisdiction of a judge to alter and vary a judgment, regularly obtained, drawn up, perfected, and affirmed by the Supreme Court.

C The brief facts of the case are that by a sale and purchase agreement dated 20 August 1984 the second defendant, Rumah Nanas Estate Sdn Bhd, agreed to sell to the plaintiff, Plenitude Holdings Sdn Bhd, a piece of estate land at a price of RM47,939,958. The plaintiff paid a deposit of RM4,793,995.80 but failed to pay the balance sum within the stipulated D period of the contract, or within the extended completion period. The second defendant then terminated the said agreement and forfeited the said deposit.

After having heard all the evidence I came to the conclusion that the termination of the contract by the second defendant was not valid and ordered specific performance of the contract for the sale and purchase of E the land in question [see [1992] 2 MLJ 68]. The second defendant appealed against my judgment and the Supreme Court dismissed the second defendant's appeal and affirmed my judgment [see [1993] 1 MLJ 113].

Subsequently, the plaintiff paid the sum of RM43,145,962.20 being the balance of the purchase price to the second defendant and obtained a valid F and legal title to the land in question.

On 17 February 1993, the second defendant filed an application by way of summons-in-chambers seeking an order that for the purpose of the specific performance by the plaintiff of the sale and purchase agreement dated 20 August 1984, the plaintiff should pay to the second defendant in addition to the balance of the purchase price of RM43,145,962.20, a G further sum as liquidated damages calculated at RM11,000 per day as expressly provided for in cl 3.4 of the agreement from 21 May 1985 to the date of actual payment.

The second defendant had applied for leave by notice of motion to the Supreme Court on 1 December 1992 prior to the hearing of the appeal H proper to include a new ground of appeal namely:

> Though the learned judge ordered the agreement of sale and purchase dated 20 August 1984 between the plaintiffs as purchasers and the second defendants as vendors to be specifically performed in respect of the said land, he failed to expressly order the plaintiffs to comply with clause 3.3 of the said agreement and pay to the second defendants the sum of RM11,000 per day as payment of I liquidated damages to be calculated on the balance purchase price of RM43,145,962.20 from 20 August 1985 to the date of actual payment.

The said application to include this fresh ground of appeal was dismissed by the Supreme Court prior to the hearing of the appeal proper.

In the trial proper before me in February 1992, the second defendant did not at any time raise the issue of a claim of RM11,000 liquidated damages per day in its pleadings, and it also did not file a counterclaim in the suit. During the hearing of the trial no question was asked by the second defendant's counsel in regard to this particular claim, and neither did counsel for the second defendant raise the matter in his submission.

However, counsel for the second defendant submitted in support of this motion that in an order for specific performance of a contract for sale of land, the contract continues to exist, and is not merged in the order of the court. As such the court is seised of the matter until the contract is fully and finally completed. Counsel for the second defendant also submitted that the provision for liquidated damages was part and parcel of the agreement and by obtaining an order for specific performance, the plaintiff had agreed to fulfil all the obligations under the terms of the agreement, including the claim relating to liquidated damages.

Counsel for the second defendant submitted some authorities in support of his proposition of the law. With respect the facts in the authorities submitted are not similar to those in the present case, more so, where an order for specific performance had been perfected after the conclusion of the trial and affirmed by the Supreme Court.

Counsel for the plaintiff submitted that the second defendant's application amounts to a new claim in the same suit where judgment had already been given by the High Court and affirmed by the Supreme Court in the plaintiff's favour. Furthermore, the second defendant at no time since proceedings were commenced in this matter in the High Court ever raise the issue of the claim for liquidated damages relating to cl 3.4 of the agreement for sale, at the trial, either expressly or impliedly. Counsel for the plaintiff also submitted that the principle of res judicata applied and the second defendant was estopped from making the same or any claim under the present suit as the claim for liquidated damages under cl 3.4 of the agreement should have been raised at the trial by the second defendant in its pleadings. Lastly, he submitted that the present application by the second defendant in effect amounts to a review of the decision made by the trial court and the Supreme Court, and that I am functus officio in respect of the present application.

In the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor*[1] Lord Kilbrandon in delivering the judgment of the court said in regard to the doctrine of res judicata at p 590 as follows:

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100, 115 where the judge says:
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> > '... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under certain circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence,

A or even accident, omitted part of their case. This plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

B In *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors* [1966] 2 All ER 536,[2] Lord Guest, after stating that the principle of res judicata has developed so as to extend to what is now described as 'issue', said at p 565:

> The requirements of issue estoppel still remain (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel
C was final; and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

In the case of *Superintendent of Pudu Prison & Ors v Sim Kie Chon*,[3]
D Abdoolcader SCJ in delivering the judgment of the Supreme Court in his judgment stated that: 'where res judicata is not strictly established or where estoppel per rem judicatam has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formerly adjudicated upon, a scandal, and an abuse, the court would not hesitate to dismiss the action.'

E In regard to this application and upon examining the pleadings in the civil suit 22–32–89, filed in the High Court at Johor Bahru, and having heard the submissions of counsel for the second defendant in that suit, no satisfactory explanation was given why the issue of liquidated damages relating to cl 3.4 of the agreement was not raised at the trial. The second defendant offered no reason why it could not with reasonable diligence
F have claimed at the trial of the civil suit, the relief it was claiming against the plaintiffs now in this application.

On the evidence before me it is abundantly clear that the second defendant knew of its right to make a claim in regard to liquidated damages relating to cl 3.4 of the agreement prior to, and at the trial, but for reasons best
G known to the second defendant, it chose to remain silent on this issue.

In regard to the submissions by learned counsel for the second defendant that the court has the jurisdiction to allow the application by the second defendant, it must be borne in mind that in the present case, apart from the reasons given above, this court is 'functus officio' once judgment on the merits of the case had been pronounced and the order perfected. In the
H instant case the Supreme Court had affirmed the judgment of the High Court and the order of the Supreme Court has been drawn up, perfected and agreed to by all parties concerned. See the case of *Hock Hua Bank Bhd v Sahari bin Murid*[4] and *Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal*.[5]

I Accordingly the application of the second defendant is dismissed with costs.

Application dismissed.

Reported by Wong Kim Fatt